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AZ CORP COMMISSION
DOCKET CONTROL

7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

9 In re the Matter of:

Docket No: S-20677A-09-0256

10 SECURE RESOLUTIONS, INC., an

11 Arizona Corporation;

12 DOUGLAS COTTLE and KYLA COTTLE,

13 HUSBAND AND WIFE,

14 Respondent.

**RESPONDENT'S RESPONSE TO
SECURITIES DIVISION'S
MOTION TO ALLOW
TELEPHONIC TESTIMONY**

Assigned to the Honorable Marc E. Stern

15
16 Respondents, by and through undersigned Counsel, hereby objects to the Securities
17 Division's Motion to Allow Telephonic Testimony. Telephonic testimony will violate the
18 Respondent's due process rights and will prevent a fair disposition of this matter. This motion
19 is supported by the following memorandum of points and authorities.

20 **RESPECTFULLY SUBMITTED THIS 27th DAY OF JANUARY, 2010.**

22 Arizona Corporation Commission

23 **DOCKETED**

24 **JAN 27 2010**

25 **DOCKETED BY**

The Baker Law Firm, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Securities Division ("Division") has listed Wesley Kikuchi, Dean Dorsey, and Thomas Adams, Sr. as witnesses in this case. Each witness is listed as an investor and is a central witness to this hearing that will provide supporting evidence of the Division's allegations. All three live out-of-state and the Division indicated that "the burdensome task of traveling down to Phoenix to provide testimony is impractical..." However, because these are "central witnesses," allowing telephonic testimony prejudices the respondents by infringing on their due process rights to cross-examine all witnesses against them.

II. ARGUMENT

The Respondents agree that the purpose of administrative proceedings is to resolve disputed matters in an efficient and cost-effective manner, which is the reason for the relaxed rules of procedure and evidence, as stated in A.R.S. § 41-1062(A)(1). However, those relaxed standards do not trump the Respondent's right to due process. Numerous federal and state cases have set forth standards that must be applied when determining when due process would be violated by allowing telephonic testimony.

In a series of appeals before the U.S. Equal Employment Opportunity Commission, that commission decided when an Administrative Judge could hold a telephonic hearing or take telephonic testimony. In *Louthen v. U.S. Postal Service*, EEOC Appeal No. 01A44521, 2006 EEO PUB LEXIS 2183 (May 17, 2006), the Commission held that because special weight is given to an administrative judge's demeanor-based credibility determinations, an administrative judge should not conduct telephonic hearings unless exigent circumstances exist or there is a joint request by the parties. Some examples given by the Commission were where parties or witnesses were at such distances that travel was not practical, such as where a civilian witness has been deployed on military reserve duty or where a witness with a disability

1 cannot physically appear at a hearing. The court noted that other exigent circumstances may
2 apply. The Commission concluded that

3 [a] telephonic hearing or testimony is permissible when the
4 [Administrative Judge] determines that such exigent
5 circumstances require it and the [Administrative Judge]
6 documents these circumstances in the record. If exigent
7 circumstances are not present, a telephonic hearing (or
8 telephonic testimony) may be conducted only if the parties
9 submit a joint request to the [Administrative Judge].

10 In *Rand v. Department of the Treasury*, EEOC Appeal No. 01A52116, the Commission
11 applied the standard laid out in *Louthen* and determined that because there were no exigent
12 circumstances on the record, the case had to be remanded for an in-person hearing. Other
13 administrative commissions have followed this reasoning, including the Securities and
14 Exchange Commission. See *In the Matter of Bridge et al.*, Administrative Proceeding No. 3-
15 12626, Securities and Exchange Commission.

16 Other states have also delineated standards that should be used in administrative
17 hearings. In Tennessee, state code leaves the issue of telephonic testimony up to the
18 administrative judge. Tenn. Code Ann. § 4-5-312(c) (2004). The case of *In re: Petition of*
19 *Tennessee Wastewater Systems, Inc.*, Docket No. 06-00259 before the Tennessee Regulatory
20 Authority refined those circumstances in which telephonic testimony was permissible. The
21 administrative judge there found that the party should demonstrate an undue burden or some
22 exceptional circumstance that would prevent personal attendance.

23 Even Arizona's Office of Administrative Hearings has set for standards for allowing
24 telephonic testimony in hearings before that tribunal:

25 The administrative law judge may grant a motion for telephonic
testimony if:

1. Personal attendance by a party or witness at the hearing will present an undue hardship for the party or witness;
2. Telephonic testimony will not cause undue prejudice to any party; and

1 3. The proponent of the telephonic testimony pays for any cost of
2 obtaining the testimony telephonically.

3 A.A.C. R2-19-114. This administrative code requires that there be an undue hardship in
4 personally attending a hearing before telephonic testimony will be allowed.

5 While these cases and statutes are not controlling on the Arizona Corporation
6 Commission, it is clear that most administrative courts have set forth standards to prevent the
7 denial of due process to the party opposing telephonic testimony. The Division has indicated
8 that the three central witnesses at issue here face "one or more obstacles" that necessitate
9 telephonic testimony. The Division also states that telephonic testimony is necessary because
10 traveling to Phoenix from Nevada and California is a "burdensome task." However, in
11 applying any of the standards set forth above, it is clear that telephonic testimony is improper
12 in this case. Under the federal standard set forth in *Louthen*, there have been no exigent
13 circumstances presented here that would necessitate telephonic testimony. The distance to be
14 traveled is nowhere near impractical. Most major cities in California and Nevada are only an
15 hour's plane ride away, with other major cities being no more than a three-hour plane ride. No
16 other possible exigent circumstances have been put forth by the division. There has been no
17 showing of any undue burden, either. No evidence or argument has been presented by the
18 Division that it would be an undue burden on any of the witnesses to appear in person. Just as
19 there has been no undue burden presented by the Division, there has been no undue hardship
20 presented to qualify for telephonic testimony under the Arizona Office of Administrative
21 Hearings rule. In short, the Division has not presented any evidence that rises to the level
22 where telephonic testimony would be appropriate.

23 The standards listed above have been put into place to protect the objecting party's due
24 process rights. If key witnesses do not testify in person, the Respondents will not be able to
25 effectively cross-examine these witnesses. No rebuttal documents can be shown to these

witnesses. That effectively limits the Respondents' rights to cross-examination and denies due process. Additionally, the credibility of witnesses may be at issue in this case. As noted by the Division, in *T.W.M Custom Framing v. Industrial Commission of Arizona*, 198 Ariz. 41 (2000), the court found that the telephonic testimony "preserves paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in making determinations of credibility." However, this leaves out one very important part of determining credibility: body language. As noted in *Louthen*, "[c]onsidering the special weight given to an [Administrative Judge's] demeanor-based credibility determinations, however, the Commission is persuaded that the [Administrative Judge] should be afforded the maximum opportunity to observe the demeanor of a witness." (Emphasis added). This idea recognizes that the credibility of witnesses should not be determined solely by the testimony provided, but how the witness acts when giving that testimony. Without a witness present, that information is lost. Because that information is lost, the Respondents' ability to effectively cross-exam the witness is diminished which violates due process.

III. CONCLUSION

Based on the foregoing, undersigned counsel respectfully requests that the Division's Motion to Allow Telephonic Testimony be denied. The Division has made no showing that there are any exigent circumstances, undue burdens, or undue hardships that would result from these key witnesses being required to appear in person. Additionally, because these are key witnesses, it is imperative that Respondents be able to effectively cross-examine these witnesses. By allowing telephonic testimony, the Commission would be violating the Respondents' due process rights, as the ability to cross-examine these witnesses would be diminished. Undersigned counsel again requests that the Division's motion be denied for these reasons.

...

1 RESPECTFULLY SUBMITTED THIS 27th DAY OF JANUARY, 2010.

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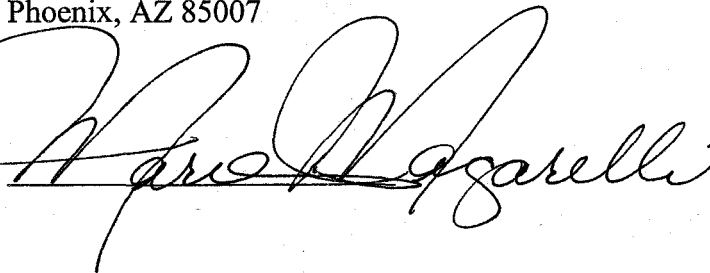
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6 MICHAEL S BAKER
7 Attorney At Law

8 Original of the foregoing to be filed
9 this 27 day of January, 2010 with:

10 Docket Control
11 Arizona Corporation Commission
12 1200 W. Washington St.
13 Phoenix, AZ 85007

14 Copy of the foregoing to be mailed/delivered
15 this ____ day of January, 2010 to:

16 Phong (Paul) Huynh, Esq.
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